In excepting to the opinion of the Court upon questions of evidence, be careful to have the question reduced to writing, the decision and the exception noted and signed by the judge. A life was once nearly lost by these matters not having been strictly attended to. Our most valuable knowledge sometimes springs from having fallen into dangerous errors. Habit should strengthen wisdom. Adopt, therefore, an inflexible rule and never waive its application. Remember a writ of error is of no use, nor will an allocatur even be granted, unless the error be explicitly presented upon the judge's notes.

If the charge be against you, except to it, but *not* in the presence of the jury; and to make matters "doubly sure," as judges do not often write their entire charges, a phonographer should be employed to furnish a literal copy and thereby prevent future difficulty, should ulterior proceedings become necessary.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MASSACHUSETTS.[1]

Attorney—Claim for Services—Statute of Limitations.—The statute of limitations does not begin to run against any part of the claim of an attorney at law for services rendered and moneys paid in conducting a suit to its termination, under a general employment, until the final entry of judgment therein: *Eliot* vs. *Lawton.*

Contract—Lien—Vessel.—Under a contract to build three light vessels for the United States, and to deliver them completed within a fixed time, and to be governed during the progress of the building of them by the directions of an agent of the United States, and to perform the work to his satisfaction, for a price to be paid after their completion, with a provision that the United States may at any time declare the contract null, no title to the vessels passes to the United States until their completion

[1] From Charles Allen, Esq., Reporter, to appear in Vol. VII. of his Reports. The abstracts in our June number, erroneously stated as from Vol. VI., will also appear in Vol. VII.

and delivery, and a lien exists and may be enforced upon one of them in favor of one who has furnished to their builder timber which has been used in its construction, although no specific portion of the timber was designated or appropriated to each of the vessels; and the United States, by accepting the vessels upon their completion, take a title subject to the lien: *Briggs et al.* vs. *A Light Boat.*

A light boat built and adapted to be used as a floating light is a vessel upon which a lien for materials furnished may attach, under Gen. Sts. c. 151, § 12: *Id.*

The city ordinance of New Bedford, prohibiting the sale of any timber brought into the city for sale, without a survey, does not apply to timber delivered there to be used for a specific purpose under a special contract made elsewhere: *Id.*

Promissory Note.—A written contract in this form: "Twelve months after date, we promise to pay to ourselves or order three hundred and twenty-one dollars for value received, payable in Boston, and subject to the policy. J. S. & Co." (Indorsed) "Pay to the order of the Anchor Insurance Co. J. S. & Co.," is not a negotiable promissory note: *American Exchange Bank* vs. *Blanchard.*

Promissory Note—Liability of One not the Maker—Authority to Sign.—Liability as the maker of a promissory note which is signed by another person with his own name alone, without words of procuration, cannot be established by proof that the person sought to be charged employed the signer of the note to carry on business for him, that the note was given for the price of articles used in the business, and that he subsequently admitted the signer's authority "to sign the note for him:" *Brown* vs. *Parker.*

Promissory Notes—Collateral Security—Application by Holder.—A creditor who holds security, without special stipulations for its application, for various notes due from his debtor, some of which bear the names of sureties, may, in case of the insolvency of the principal debtor and of some of the sureties, apply the same towards the payment of such of the notes as may be necessary for his own protection; and solvent sureties upon other of the notes cannot avail themselves thereof in any way, in equity, without paying or offering to pay the whole of the notes for which the security was given: *Wilcox et al.* vs. *The Fairhaven Bank et al.*

Railroad Company—Loss of Baggage—Connecting Lines.—If various

railroad companies whose lines connect together from Massachusetts into the British Provinces have arranged together for an excursion train over their several roads, and the company at this end of the route issues tickets with coupons attached for the whole distance, and its agent refuses to give a check for the luggage of a purchaser of such ticket, saying that the same "would be perfectly safe, as he was to go through with them," and the luggage is accordingly put into one of the company's baggage-cars, which is sent through the whole distance in charge of its agent, the company is liable if the luggage is lost anywhere upon the route: *Najac* vs. *Boston and Lowell Railroad Company.*

Right of Way—Acquisition of by User.—A right of way as appurtenant to land, may be acquired by the adverse use, for twenty years together, of several persons in succession, who claim under the same title; and a grant of the land, "with the privileges thereunto belonging," to have and to hold the same "with all the privileges and appurtenances," by an owner who has commenced such use, constitutes a sufficient privity of estate to enable the purchaser to avail himself of his grantor's use: *Leonard* vs. *Leonard.*

Polygamy—Indictment for—Divorce as a Defence—Onus Probandi.—If the defendant in an indictment for polygamy relies upon a divorce as a justification of a second marriage, it is incumbent on him to prove it: *Commonwealth* vs. *Boyer.*

COURT OF APPEALS OF NEW YORK.[1]

Arbitration—Void for Want of Jurisdiction of Subject-Matter—Married Woman—Separate Estate.—The submission to arbitration of any claim to a freehold in real estate, being prohibited by statute, is not merely voidable, but is void and incapable of ratification: *Wiles* vs. *Peck.*

Since the act of 1849, for the protection of the rights of married women, *it seems* that no acknowledgment is requisite to a conveyance of the separate estate of one: *Id.*

Married Woman—Coercion—Policy of Insurance—Transfer.—Terrifying a woman so as nearly to produce hysterics by threats of prosecuting her husband for alleged embezzlement, is such coercion as to avoid a transfer of her separate property thus obtained: *Eadie* vs. *Slimmon.*

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[1] To appear in Vol. XII. of E. P. Smith's Reports.

A policy of insurance to a married woman, made under chapter 80 of 1840, for her benefit and that of her children in case of her death, cannot be transferred so as to divest the interest of the wife or her children: *Id.*

Insurance—Death of Insured—Upon whom the Interest devolves.—Upon the death of one who has effected an insurance against fire of his house, the interest in the policy devolves upon his heirs at law, and, in case of loss, the damages accrue to them: *Wyman, Administratrix*, vs. *Wyman et al.*

Where the policy runs to the assured, his executors or administrators, the personal representative may, *it seems*, maintain an action, as trustee, for those beneficially interested in the real estate: *Id.*

The damages recovered stand in the hands of the administrator, not as personal assets, but as realty, subject to dower and to the lien of creditors by judgment before distribution among the heirs at law.

Criminal Law—Seduction—Previous Chaste Character—Evidence.—Under the act to punish seduction as a crime (ch. 111 of 1848) it is sufficient that the defendant effected his object by a conditional promise that, if the girl would permit his illicit connection, he would marry her: *Kenyon* vs. *The People.*

The submitting to his embraces upon this proposition is, it seems, a promise to marry on her part: *Id.*

Evidence of general reputation of the girl's want of chastity is inadmissible. Previous chaste character, in this statute, means actual personal virtue—not reputation; and can be impeached only by specific proof of lewdness: *Id.*

The corroboration of the seduced female, required by the statute, relates to the promise and the intercourse: it is not necessary in respect to her chastity or to her being unmarried: *Id.*

The evidence of the seduced female is admissible that the promise of marriage was the inducement to the illicit intercourse: *Id.*

It is unnecessary that the promise should be a valid one, or that the defendant be of full age. It is sufficient that he has arrived at the age of puberty: *Id.*

Criminal Law—Counterfeiting Bank Check—Averment of Forgery—Certified Check.—To convict one charged with uttering a counterfeit bank check set out in the indictment and purporting to have been certified

by some person purporting to be connected with the bank on which the check was drawn, it is sufficient to prove that the words of certification were false, and that no person of the name signed to the certificate was connected with the bank, without showing that the signature of the drawers was a forgery: *The People* vs. *Clements.*

A certified check on a bank is an instrument which, as an entirety, comes within the statute of forgery; and where evidence, received without objection, shows that any material part of it was forged, *e. g.*, the certificate, it is immaterial that the indictment does not specify that the forgery was of the certification, and not of the check itself: *Id.*

The indictment need not aver that the paper is, in the words of the statute, "an order for the payment of money, or any instrument by which a pecuniary demand is created:" *Id.*

Rex *vs.* Horwell, 6 Carr. & Pa. 148, distinguished, on the diversity between our statute and the British: *Id*

Promissory Note—Alternative Condition—Notice.—A promissory note was payable in four annual instalments, or when $50,000 should have been subscribed for the endowment of a college, the payee, at the election of the maker. The four years having expired, the payee may recover without proof of notice that the subscription was completed, or of demand of payment: *The Genesee College* vs. *Dodge.*

Genesee College could lawfully stipulate, in consideration of a subscription to its endowment, to give one free scholarship for ever to the subscriber, his heirs or assigns, in another incorporated seminary of learning: *Id.*

Mortgage of Vessel—Act of Congress of July 29, 1850.—The Act of Congress of July 29, 1850, for the recording in a collector's office of mortgages of vessels, does not supersede a state law requiring the record of such mortgage with a state officer as the condition of its validity against third persons: *The Ætna Insurance Co.* vs. *Aldrich et al.*

Held, accordingly, that the mortgage of a vessel recorded in the collector's office at Chicago, where the parties resided, was void as against a creditor in this state, because not recorded as required by the law of Illinois: *Id.*

Sale—Vendor and Vendee—Defective Title—Action for Price—Waiver of Fraud.—One who was entitled to logs which he had cut upon the land of another, under an agreement that they were to be his when he paid a certain sum, greatly inferior to their value as logs, sold them, without

disclosing his defect of title. The vendee, after learning the facts, agreed to pay upon a deduction being made from the price upon other ground than the defect of title. This was a waiver of defence on the grounds of fraud: *Sweetman* vs. *Prince et al.*

Assuming that the vendor was guilty of deceit, and that the vendee had not waived his defence, whether he could set it up, not having been disturbed in the possession by the person having the legal title, and not having offered to return the property to the vendor, *quære*: *Per* MARVIN, J.: *Id.*

The vendee of chattels may, *it seems*, voluntarily yield possession to a claimant, and recover against the vendor on the implied warranty of title, upon showing that the claimant had title paramount: *Per* MARVIN, J.: *Id.*

Vendor and Vendee—Failure to deliver proper Quantity of Goods—Waiver of Defence for such Failure.—Where goods are received and used by the vendee under a contract for the delivery of specified quantities in each of three successive months, the quantity delivered being less than that required by the contract, such breach is a bar to an action by the vendor for the price of the goods delivered: *Catlin* vs. *Tobias.*

The vendee under such a contract has a right to expend the goods delivered, as required in his business, without waiting for the expiration of the month to see whether the vendor will fully perform his contract, and such use is no waiver of his defence in case of the vendor's breach of contract: *Id.*

SUPREME COURT OF PENNSYLVANIA.[1]

Assumpsit for Money had and received against One to whom Money was delivered by Debtor for Plaintiff.—One in whose hands money is placed by a debtor for the payment of a debt, is liable in an action for money had and received, at the suit of the creditor to whom the payment was to have been made: *Stoudt* vs. *Hine.*

As the defendant was liable as agent rather than as surety, it was not necessary that his promise should have been in writing, and hence the Statute of Frauds does not apply: *Id.*

Liability of Railroad Company for Baggage of Passenger lost in passing over Connecting Roads for which Ticket was sold.—Where the ticket sold by a railroad company to a point upon a connecting road, contained a

[1] From Robert E. Wright, Esq., Reporter; to appear in Vol. IX. of his Reports.

printed stipulation, that in selling the company acted as agent only for roads beyond the terminus of their road, and assumed no responsibility therefor, the company is not liable to a passenger for the loss of baggage not occurring upon the line of their own road: *Pennsylvania Central Railroad Co.* vs. *Schwarzenberger.*

Settlement by Husband on Wife, when good in Law—Fraud a Question of Fact for the Jury—Settlement made in another State, effect of on Claim of subsequent Local Creditor—Declaration of Parties relative to Transaction, when Evidence.—A husband may, without the intervention of a trustee, settle upon his wife a reasonable portion of his estate, if it be not done in contemplation of future indebtedness and he be free from debt or perfectly solvent after payment of all his existing debts: but the settlement must be in such a form as to place the gift within her power and under her control: *Townsend et al.* vs. *Maynard.*

Upon such a settlement no legal presumption of fraud arises, but the question is one of fact for the jury as to the intention of the parties: *Id.*

Where a settlement by a husband was made in another state, by permitting a mortgage taken for real estate sold by him to be made to his wife, who, on payment of the amount due, loaned it to him upon his note to a trustee for her use; such settlement cannot be impeached by creditors in this state, whose claims arose several years thereafter and more than one year after the husband had removed and engaged in business here, the transaction being valid under the *lex loci contractus: Id.*

The declarations of the husband and wife, not relating to the original ownership of the money by her, but only to its transmission by her to her husband as a loan evidenced by a note given by him to her trustee, occurring before any claims of creditors existed, are competent evidence: *Id.*

Liability of Firm, for Debts contracted by Partner in his Own Name, in Trust for Partnership Purposes.—Where a partner buys real estate in his own name and gives his individual bonds and mortgage in part payment therefor, the firm is not liable to the seller for the unpaid purchase-money, though it appear by the firm-books that the land was bought on firm account, and a declaration of trust was afterwards executed by the purchaser, but not recorded, declaring that the money paid was partnership funds, and that the land was held by him in trust as partnership property: *North Pennsylvania Coal Company's Appeal.*

After failure of the firm, on sale of the land by their assignee, the part-

nership creditors were held alone entitled to share in the proceeds, and not the vendors, who could claim only against the purchasing partner: *Id.*

Unrecorded Mortgage, Validity of as to subsequent Judgment-Creditors.—A mortgage given for the purchase-money of real estate, executed before, but not recorded until after judgments had been entered against the mortgagor, is entitled to priority over them in the distribution of the proceeds of a sheriff's sale of the land where the judgment-creditors had actual knowledge of the mortgage before the debts were contracted for which the judgments were obtained: *Britton's Appeal.*

Detention or Stoppage in Transitu of Goods sold, not a Rescission of the Contract.—The detention, by vendors, of goods sold, on the insolvency, and assignment for benefit of creditors by the vendees, does not rescind the contract of sale: and the vendors are entitled to *pro rata* distribution out of the assigned estate: *Patten's Appeal.*

Where a part of the goods had been delivered, and the balance which had been detained was sold by the vendors, who applied proceeds to the payment of the notes given upon the sale, leaving a balance still due, it was *held*, that they were entitled to a dividend upon the whole amount of their *claim* at the date of the assignment: *Id.*

Water-Rights—Right of Plaintiff to recover Damages for swelling Water restricted to Six Years without Plea of Statute of Limitations—Effect of Natural Obstruction in Stream in connection with Dam, complained of—Rights of Riparian Owner controlled by actual visible Facts rather than instrumental Measurement.—In an action for swelling back water in a creek upon plaintiff's land, by a dam erected by defendant, the instruction of the court to the jury that the plaintiff could recover damages only for six years prior to bringing suit, though unnecessary, as the Statute of Limitations had not been pleaded, was harmless to the defendant and cannot be assigned as error by him: *Brown* vs. *Bush.*

Where a natural or artificial "stone row" had existed in the bed of the stream on land of the defendant for many years, forming, as alleged, a dam which flooded the plaintiff's land, it was error to instruct the jury that the "stone row" was not such an obstruction as would acquire a right from lapse of time: but where, in direct connection therewith, the court charged that if the stone row did form a dam and raise the water, the question was whether the dam did not swell back the water still

farther upon plaintiff's land, the error was immaterial and formed no ground for reversal: *Id.*

The water-power of a riparian owner consists of the difference of level between the surface of the stream at its entry on, and the surface at its exit from his land: but though instrumental levelling shows more fall on the land than the owner has height at his dam, yet if "actual visible facts" show a swelling back of the water upon the adjoining owner's land farther than before the erection of the dam complained of, the instrumental measurements must give way to the actual facts as shown on the ground: and instruction to the jury to give preference to the actual facts over the instrumental evidence, is not error: *Id.*

Account Render—Party incompetent as Witness—Dismissal of Bill in Equity filed by Plaintiff, no bar to Action after Plea of Quod Computet—*Account of Auditor, what to be included in.*—In account render after judgment of *quod computet* confessed by the defendant, he is not a competent witness in his own behalf before the auditor appointed to ascertain the amount due and make report: *Tutton* vs. *Addams.*

Where a bill filed by plaintiff had been dismissed at his costs, before the institution of the action of account, the defendant cannot, after his confession of judgment therein, set up the decree in equity as a bar to the action: *Id.*

It is the duty of the auditor to include all matters of account between the parties arising subsequently to the institution of the action, down to the time of filing his report: *Id.*

Quo Warranto *to try Right to Office must be brought during the Official Lifetime of the Officer—Officer* de facto *will be considered also* de jure *as to all Official Acts, unless judicially removed before Expiration of Term.*—If an election for managers of a corporation be not disputed during their term of office by *quo warranto*, and they are permitted to act throughout their term as managers *de facto*, the legality of the next election cannot be questioned for any vice or irregularity in the first: *Commonwealth ex rel. Jackson* vs. *Smith.*

Where the charter did not fix the place at which the annual elections should be held, the board of managers for the time, had the right to fix it as officers *de facto:* their title could only be tested by *quo warranto* brought in the lifetime of their office: *Id.*

A writ of *quo warranto* brought within the term of an office may be

tried after the term has expired: but title to a past and defunct office cannot be tried in a proceeding instituted, not against incumbents during its lifetime, but against those succeeding the next year: *Id.*

Husband and Wife—Declaration of Husband as to Wife's Ownership of Property inadmissible Testimony for Her—Possession by Wife no Evidence of Ownership—Gift to Wife not a Settlement.—The declaration of the husband that certain property belonged to his wife, is not admissible as evidence in favor of the wife: *Parvin* vs. *Capewell.*

The mere possession of money by a wife is no evidence of her title to it for the purposes of the statute; it ordinarily implies that she is holding it for her husband: *Id.*

The mere gift of money by the husband to the wife, is not a settlement of it as her separate estate: *Id.*

Construction of Will—Meaning of Word "Heirs," in Residuary Clause of Will containing Legacies to Persons who were Heirs at Law and Others not related to Testator.—In a bequest by a testator of his residuary estate "to be equally divided amongst the whole of heirs already named in this my will proportioned agreeably to the several amounts given to each in the body of this my will," the word "heirs," is to be taken in its technical signification, as referring to those named in the will who would have been his legal heirs had he died intestate, and not to legatees who were strangers to his blood: *Porter's Appeal.*

NOTICES OF NEW BOOKS.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SURROGATES' COURTS OF THE STATE OF NEW YORK. By AMASA A. REDFIELD, Counsellor at Law. Vol. I. New York: JOHN S. VOORHIES, Law Publisher and Bookseller, 20 Nassau street. 1864.

This volume is a continuation of Bradford's Surrogate Reports, and forms the fifth of that Series. We are very glad to see that the publication of this class of reports is resumed. Bradford's Reports were heartily welcomed by the profession, and contained cases of great interest which were thoroughly and learnedly discussed by the Court. They were confined, however, to the City of New York. Mr. Redfield's volume is of